Supreme Court, U.S.
FILED
MAY 1 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-1088

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

vs.

ALAN WOODS and CARA WOODS,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

JOINT APPENDIX

L. VASTINE STABLER, JR.*
HATTIE E. KAUFMAN
CABANISS, JOHNSTON,
GARDNER, DUMAS & O'NEAL
1900 First National-
Southern Natural Building
Birmingham, Alabama 35203
(205) 252-8800
Counsel for Petitioner

CARLTON T. WYNN*
FRANCIS HUTCHESON HARE, JR.
HARE, WYNN, NEWELL & NEWTON
700 City Federal Building
Birmingham, Alabama 35203
(205) 328-5330
Counsel for Respondents

* Counsel of Record

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

PETITION FOR CERTIORARI FILED DECEMBER 17, 1985
CERTIORARI GRANTED MARCH 24, 1986

45pp.

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APPENDIX A

BURLINGTON NORTHERN RAILROAD COMPANY
v. ALAN WOODS AND CARA WOODS

Docket Entries in
Circuit Court of Jefferson County,
Bessemer, Alabama

10/12/82 Summons and Complaint

10/15/82 Amendment to Complaint

11/16/82 This case transferred to U. S. District Court #CV 82 C2415S

Docket Entries in
United States District Court
Northern District of Alabama
Southern Division

9/27/83 Motion of plff to file amendment to complaint with exhibit attached, filed-cs-afp — 10/21/83 GRANTED (CLEMONS); Entered 10/24/83-cm-afp

1/13/84 FINAL JUDGMENT, dated 01/13/84, based on special verdict returned by the jury, that judgment is entered in favor of plff, Alan Woods and against deft Burlington Northern Railroad Company, in the amount of $300,000.00; and judgment entered in favor of plff Cara Woods and against deft Burlington Northern Railroad Co. in amount of $5,000.00; costs are taxed against deft for which execution shall issue, filed (CLEMON); Entered 01/13/84-cm-afp

1/23/84 Motion of deft, Burlington Northern Railroad, for judgment notwithstanding the verdict, or, in the

alternative, for a new trial, filed-cs-afp
— 6/29/84 OVERRULED (CLEMON); Entered 07/03/84-cm-afp

7/24/84 Notice of Appeal of deft from Order entered 07/03/84 filed - dpb

7/24/84 Motion of deft for stay of execution pending appeal and for approval of a Supersedeas Bond filed-cs-dpb (del to Clemon)
— 08/06/84 GRANTED (CLEMON); ENTERED 08/08/84 - cm - dpb

7/25/84 Certified copy of Notice of Appeal, Order appealed from and docket entries mailed to Clerk-USCA; copy of transmittal letter, Notice of Appeal and docket entries mailed to attys of record - dpb

8/8/84 Supersedeas Bond ($34,750.00) approved by the Court and filed - dpb

9/23/85 Certified copy of ORDER, USCA, entered 09/19/85, that BY THE COURT: Appellees' motion for 10% penalty assessment pursuant to Alabama Statute is GRANTED (VANCE, JOHNSON and MORGAN) filed - dpb

9/23/85 Certified copy of ORDER, USCA, entered 09/19/85, that appellants' motion to stay further proceedings is DENIED; appellants' alternative motion for oral argument on appellees' motion for assessment of statutory penalty is DENIED, the question is controlled by binding precedent (VANCE) filed - dpb

10/3/85 Certified copy of JUDGMENT, USCA, entered 08/16/85 and issued as mandate 10/01/85 with slip Opinion and Bill of Costs attached, that the judgment of the District Court is AFFIRMED; further,

that defts-appellants pay to plffs-appellees the costs on appeal (VANCE, JOHNSON and MORGAN) filed; record received - dpb

11/12/85 Stipulation of the parties that payment of the $30,500 statutory affirmance penalty ordered by the USCA is being withheld pending resolution by the Supreme Court, filed-snh

Docket Entries in
United States Court of Appeals
for the Eleventh Circuit

7/24/84 Notice of Appeal filed

8/16/85 Judgment on Appeal entered - Judgment Below Affirmed

8/26/85 Appellee's Motion for Assessment of Statutory Penalty - filed

8/30/85 Response to Appellee's Motion for Assessment of Statutory Penalty - filed

8/30/85 Appellant's Motion for Stay of Proceedings or in the Alternative for Oral Argument - filed

9/5/85 Appellant's Petition for Panel Rehearing filed

9/19/85 Order denying appellant's motion to stay further proceedings; order denying appellants alternative motion for oral argument

9/19/85 Order granting appellee's motion for 10% penalty assessment - entered

9/23/85 Petition for Rehearing denied

11/14/85 Stipulation of the parties that payment of the $30,500 statutory affirmance penalty is being withheld pending resolution by the Supreme Court - filed

APPENDIX B

IN THE CIRCUIT COURT FOR THE TENTH
JUDICIAL CIRCUIT OF ALABAMA
(BESSEMER DIVISION)

Civil Action No. CV 82-453

Alan Woods & Cara Woods,
Plaintiffs,

vs.

Louisville & Nashville Railroad
Company; City of Pensacola, Florida;
"X", the person, firm, corporation
or partnership responsible for paving,
street repair, surface preparation,
of the street known as Main Street,
near Jefferson Street, in Pensacola,
Florida, prior to the date of August 14, 1982,
all of whose names are yet unknown to
plaintiffs, but, when ascertained, will
be added by amendment,
Defendants.

COMPLAINT

1. Come now the plaintiffs and allege that on or about August 14, 1982, in the City of Pensacola, Escambia County, Florida, while plaintiffs were travelling West along Main Street, the juncture of pavement and railroad tracks was so negligently and/or wantonly prepared or maintained by said defendants, as to cause plaintiffs' vehicle to turn over, directly causing injuries and damages to plaintiffs, as enumerated hereinbelow.

2. Plaintiffs allege that said pavement was applied in such a negligent and/or wanton manner by defendants as to create huge mounds and deep crevices along the tracks, creating an extremely dangerous and grossly uneven surface, characterized by

ruts, promontories, holes and crevices, all disguised and caused by the overcoating of pavement.

3. Plaintiff, Alan Woods, was caused to suffer great physical pain and suffering and is severely injured, having a dislocated right shoulder, requiring surgery, and resulting in loss of employment and wages and causing great expense to himself, in and about his efforts to care for said injuries, all directly resulting from defendants' negligence and/or wantonness.

4. Plaintiff, Cara Woods, alleges that as a direct result of defendants' negligence and/or wantonness, she was severely injured in that she was bruised and contused and suffered great physical pain and mental anguish.

5. Plaintiff, Alan Woods, alleges that he lost the consortium of his wife, Cara Woods, as a direct result of the injuries caused by defendants' negligence and/or wantonness.

6. Plaintiff, Cara Woods, alleges that she has lost the consortium of her husband, Alan Woods, as a direct result of the injuries, loss of employment, and pain and suffering her husband has suffered, caused by defendants' negligence and/or wantonness.

WHEREFOR, Plaintiff, Alan Woods, claims of the defendants the sum of Fifty Thousand ($50,000.00) Dollars, exclusive of costs and interest.

WHEREFOR, Plaintiff, Cara Woods, claims of the defendants the sum of Five Thousand ($5,000.00) Dollars, damages exclusive of costs and interest.

/s/ MAC PARSONS

/s/ WILLIAM J. WYNN
Attorneys for Plaintiffs
1285-E Hueytown Road
Hueytown, Alabama 35023
(205) 491-8170

PLAINTIFFS DEMAND A TRIAL BY STRUCK JURY IN THIS CAUSE.

/s/ MAC PARSONS

/s/ WILLIAM J. WYNN

Plaintiffs' Address:

1325 King George Drive
Alabaster, Alabama 35007

Serve Defendant, Louisville & Nashville Railroad Company at:

4100 Vanderbilt Road
Birmingham, Alabama 35207

Serve Defendant, City of Pensacola, Florida at:

City of Pensacola
Legal Department
330 South Jefferson (P.O. Box 12910)
Pensacola, Florida 32521

APPENDIX C

IN THE CIRCUIT COURT FOR THE TENTH
JUDICIAL CIRCUIT OF ALABAMA
(BESSEMER DIVISION)

Civil Action No. CV 82-453

Alan Woods & Cara Woods,
Plaintiffs,

vs.

Louisville & Nashville Railroad
Company; City of Pensacola, Florida;
Burlington Northern Railroad Company;
et. al.,
Defendants.

AMENDMENT TO COMPLAINT

Come now the Plaintiffs, Alan Woods and Cara Woods, and hereby amend their complaint by adding as party Defendant, in each paragraph, the Burlington Northern Railroad Company.

/s/ MAC PARSONS

/s/ WILLIAM J. WYNN
Attorneys for Plaintiffs
1285-E Hueytown Road
Hueytown, Alabama 35023
(205) 491-8170

Plaintiffs' Address:

1325 King George Drive
Alabaster, Alabama 35007

Serve Defendant, Burlington Northern Railroad Company at:

30 South 18th Street
Birmingham, Alabama 35233

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. CV 82-C-2415-S

Alan Woods and Cara Woods,
Plaintiffs,

vs.

Burlington Northern Railroad Company, a corporation, et al.,
Defendants.

AMENDMENT TO THE COMPLAINT

Come the plaintiffs in the above styled cause, and amend their complaint as last amended, by the plaintiff, Alan Woods, claiming of the defendants as compensatory damages, TWO HUNDRED THOUSAND DOLLARS ($200,000.00), exclusive of interest and costs, and by the plaintiff, Cara Woods, claiming of the defendants as compensatory damages, FIVE THOUSAND DOLLARS ($5,000.00), exclusive of interest and costs. Plaintiff, Alan Woods, claims of the defendants as punitive damages, TWO HUNDRED THOUSAND DOLLARS ($200,000.00), exclusive of interest and costs, and the plaintiff, Cara Woods, claims of the defendants as punitive damages, FIVE THOUSAND DOLLARS ($5,000.00), exclusive of interest and costs.

MAC PARSONS, WILLIAM J. WYNN

and

HARE, WYNN, NEWELL & NEWTON
Attorneys for Plaintiffs

By: /s/ Carlton T. Wynn
700 City Federal Building
Birmingham, Alabama 35203
(205) 328-5330

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number 82-C-2415-S

Alan Woods and Cara Woods,
Plaintiffs,

vs.

Burlington Northern Railroad Company,
Defendant.

FINAL JUDGMENT

Based on the special verdict returned by the jury herein, JUDGMENT is hereby ENTERED in favor of plaintiff, ALAN WOODS, and against defendant, BURLINGTON NORTHERN RAILROAD COMPANY, in the amount of Three Hundred Thousand and no/100 Dollars ($300,000.00); and JUDGMENT is hereby ENTERED in favor of plaintiff, CARA WOODS, and against defendant, BURLINGTON NORTHERN RAILROAD COMPANY, in the amount of Five Thousand and no/100 Dollars ($5,000.00).

The costs of this action are hereby taxed against defendant for which execution shall issue.

DONE this 13th day of January, 1984.

/s/ U. W. Clemon
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number 82-C-2415-S

Alan Woods and Cara Woods,
Plaintiffs,

vs.

Burlington Northern Railroad Company,
Defendant.

SPECIAL VERDICT

1. Was there negligence on the part of defendant, Burlington Northern Railroad Company, which was a legal cause of damage to plaintiff Alan Woods?

Yes X No____

2. Was there negligence on the part of defendant, Burlington Northern Railroad Company, which was a legal cause of damage to plaintiff Cara Woods?, Yes X No____

If your answers to both Question 1 and Question 2 are "NO," your verdict is for defendant, and you should not go any further except to date and sign this verdict form and return it to the courtroom. If your answer to Question 1 is "YES," go to Question 3. If your answer to Question 1 is "NO," Skip Questions 3, 4, and 5 and go to Question 6.

3. Was any negligence on the part of plaintiff Alan Woods also a legal cause of his damage?

Yes____ No X

If your answer to this Question is "YES," go to Question 4. If your answer is "NO," Skip Question 4 and go to Question 5.

4. State the percentage of any negligence, which was a legal cause of damage to plaintiff Alan Woods, that you charge to:

Burlington Northern Railroad Company_____%

Alan Woods _____%

TOTAL MUST BE 100%

5. What is the total amount (100%) of any damages sustained by plaintiff Alan Woods and caused by the incident in question.

$300,000.00

In determining the total amount of damages, do not make any reduction because of the negligence, if any, of plaintiff Alan Woods. If you have found Alan Woods negligent in any degree, the Court in entering judgment will reduce Alan Woods' total amount of damages (100%) by the percentage of negligence which you found to be chargeable to Alan Woods.

6. Was any negligence on the part of plaintiff Cara Woods also a legal cause of her damage?

Yes____ No X

If your answer to this Question is "YES," go to Question 7. If your answer is "NO," Skip Question 7 and go to Question 8.

7. State the percentage of any negligence, which was a legal cause of damage to plaintiff Cara Woods, that you charge to:

Burlington Northern Railroad Company_____%

Cara Woods _____%

TOTAL MUST BE 100%

8. What is the total amount (100%) of any damages sustained by plaintiff Cara Woods and caused by the incident in question.

$5,000.00

In determining the total amount of damages, do not make any reduction because of the negligence, if any, of plaintiff Cara Woods. If you have found Cara Woods negligent in any degree, the Court in entering judgment will reduce Cara Woods' total amount of damages (100%) by the percentage of negligence which you found in chargeable to Cara Woods.

SO SAY WE ALL this 12 day of January, 1984.

Lonnie Butler
Foreperson

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ALABAMA

Case Number: CV-82-C-2415-S

Alan Woods and Cara Woods

vs.

Burlington Northern Railroad Company

CLERK'S COURT MINUTES

This action came on for trial on January 10, 1984, before the Court and a jury, Honorable U.W. Clemon, United States District Judge, presiding, and the issues having been duly tried;

It is ORDERED and ADJUDGED that a written judgment will be entered by the Court based on the special interrogatories propounded to the jury.

DATED: January 12, 1984 James E. Vandegrift, Clerk

Birmingham, Alabama /s/ James B. Dunford

Court Reporter: Margo Nelson DEPUTY CLERK

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number 82-C-2415-S

Alan Woods and Cara Woods,
Plaintiffs,

vs.

Burlington Northern Railroad Company,
Defendant.

MOTION OF DEFENDANT BURLINGTON NORTHERN RAILROAD COMPANY FOR A JUDGMENT NOTWITHSTANDING THE VERDICT, OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

Comes now Burlington Northern Railroad Company, defendant in the above-styled cause, having at the close of the plaintiffs' evidence and at the close of all the evidence, moved the Court to direct a verdict in its favor, which motions were denied, and thereafter a verdict having been returned by the jury on January 12, 1984, in favor of plaintiff Alan Woods against defendant in the amount of $300,000.00 and in favor of plaintiff Cara Woods against defendant in the amount of $5,000.00, moves to have said judgments entered on January 13, 1984, set aside and that judgment be entered in accordance with defendant's motions for directed verdict. This motion is made on each and all of the grounds asserted in support of said motions for directed verdict.

In the alternative, and if its motion for judgment notwithstanding the verdict is denied, defendant moves the Court to set aside the verdict against defendant and the judgments entered thereon, and to grant this defendant a new trial.

In support of its motion for a new trial, defendant assigns the following grounds separately and severally that:

1. The verdict of the jury against defendant is contrary to the law and evidence of this case.

2. The verdict of the jury against defendant is contrary to the great weight of the evidence.

3. The verdict of the jury against defendant is excessive.

4. The finding of the jury that the plaintiff was not guilty of contributory negligence is contrary to the great weight of the evidence.

5. The verdict of the jury against defendant is so excessive as to indicate bias, prejudice, or passion on the part of the jury.

6. There was insufficient evidence to permit the jury to determine that the defendant had a legal duty to maintain the pavement adjacent to the railroad track at the point of the accident. In the absence of any such evidence, any determination that defendant was negligent could only have been based upon the jury's conjecture and speculation.

7. There was insufficient evidence to permit the jury to determine that the accident would not have occurred but for the condition of the pavement adjacent to the railroad tracks. In the absence of such evidence, any determination by the jury that any negligence on the part of defendant proximately caused the plaintiffs' injuries could only be based on the jury's conjecture and speculation.

8. The jury erred, capriciously or ignorantly, in basing its verdict against defendant upon speculation and/or bias and/or prejudice and/or sympathy.

9. There was an irregularity in the proceedings of the Court, by which defendant was prevented from having a fair trial, in that the Court permitted evidence of other motorcycle accidents which occurred at a remote location far from the location of the accident in question to be considered by the jury as evidence against defendant.

10. There was an irregularity in the proceedings of the Court, by which defendant was prevented from having a fair trial, in that the Court permitted evidence of motorcycle accidents wich occurred subsequent to the accident in question to be considered by the jury as evidence against defendant.

11. There was an irregularity in the proceedings of the Court, by which defendant was prevented from having a fair trial, in that the Court permitted evidence of motorcycle accidents which occurred subsequent to the accident in question and which had been admitted solely to impeach the testimony of Mr. Bill Padley to be considered by the jury as substantive evidence (Plaintiffs' Exhibit 17.)

12. There was an irregularity in the proceedings of the Court, by which defendant was prevented from having a fair trial, in that the Court permitted evidence of other motorcycle accidents which occurred at a location remote from the location of the accident to be presented to the jury without testimony of the witness.

13. There was an irregularity in the proceedings of the Court, by which defendant was prevented from having a fair trial, in that the Court permitted photographs depicting the tracks at a remote location (Plaintiffs' Exhibits 1 through 7) to be considered by the jury as evidence against defendant.

14. There was an irregularity in the proceedings of the Court, by which defendant was prevented from having a

fair trial, in that the Court permitted evidence of a complaint relating to warning signs at a crossing far from the location of this accident (Plaintiffs' Exhibits 37 and 38) to be considered by the jury as evidence against defendant.

15. There was an irregularity in the proceedings of the Court, by which defendant was prevented from having a fair trial, in that the Court permitted Sections 129-7 and 129-8 of the Pensacola City Code to be admitted into evidence (Plaintiffs' Exhibits 31 and 32) and to be considered by the jury as evidence against this defendant.

16. There was an irregularity in the proceedings of the Court, by which defendant was prevented from having a fair trial, in that the Court admitted into evidence photographs (Plaintiffs' Exhibits 1 through 7) which had not been identified by plaintiffs as potential exhibits at trial by October 14, 1983, as required by this Court's Pre-Trial Order entered on July 29, 1983.

17. There was an irregularity in the proceedings of the Court, by which defendant was prevented from having a fair trial, in that the Court admitted into evidence certain accident reports (Plaintiffs' Exhibit 17), which had not been seen by defendant's attorneys prior to the day of trial, and which had not been designated as potential exhibits at trial by October 14, 1983, as required by this Court's Pre-Trial Order entered on July 29, 1983.

18. There was an irregularity in the proceedings, by which plaintiff was prevented from having a fair trial in that the Court applied its Pre-Trial Order unevenly by enforcing the following portion of the Pre-Trial Order:

> Except to the extent written notice to the contrary is filed with the Clerk of the Court within five days after receiving such list, each party shall be deemed to have agreed (for purposes of this litigation only):

(a) that the originals of the listed exhibits are authentic within FRE 901 and 902;

(b) that a duplicate, as defined in FRE 1001, of the listed exhibits is admissible to the same extent as would be the original;

(c) that any of the listed exhibits purporting to be records described in FRE 803(6) meet the requirements of such rule without extrinsic evidence;

(d) that any of the listed exhibits purporting to be correspondence were sent by the purported sender and received by the purported recipient on approximately the dates shown or in accordance with customary delivery schedules;

(e) that any listed photographs fairly and accurately portray the scene therein depicted as of the time when made;

(f) that any listed bills for services or materials are reasonable in amount for the services or materials therein billed; and,

(g) that each of the listed documents is admissible at trial.

and failing and refusing to enforce the following portion of the pre-trial order:

Unless specifically agreed between the parties or allowed by the court for good cause shown, the parties shall be precluded from offering as substantive evidence any exhibit not so identified.

thereby ruling that all documents would be admitted regardless of the application of rules of evidence (Plaintiffs' Exhibits 1-7, 37-38).

19. There was an irregularity in the proceedings of the Court, by which defendant was prevented from having a fair trial, in that the Court admitted into evidence two provisions of the Pensacola City Code (Plaintiffs' Exhibits 31 and 32) which had not been designated as potential exhibits at trial by October 14, 1983, as required by this Court's Pre-Trial Order entered on July 29, 1983.

21. The trial court erred in overruling defendant's objection to the following portion of plaintiffs' closing argument:

> That company doctor is never going to pass him, got men out there laid off 100% strong as this man ever thought about being and who do you think they are going to call back first?

22. The trial court erred in overruling defendant's objection to the following portion of plaintiff's closing argument:

> The tracks were exactly the way this police officer said they were. They were popped up, buckled, had holes in them, city was telling them "fix it", we got a complaint, "Why don't you get out there and do it?" Well, what's it going to take to do it? What's it going to take? I submit to you it takes people like you sitting in juries to make them get out there and fix it.

23. The trial court erred in overruling defendant's objection to the plaintiffs' use of demonstrative evidence in the course of rebuttal closing argument which had not been identified in the first oral argument, thereby preventing counsel for the defendant an opportunity to respond.

24. The trial court erred in charging the jury as follows:

> The City of Pensacola requires that railroad companies plank or pave their tracks at street crossings in the city, and that they must keep such street crossings "in good repair and so as to permit vehicles to pass across same without damage or hindrance."

25. The trial court erred in charging the jury as follows:

> Therefore, under Florida law, a railroad company is liable for injuries to persons as a direct result of its negligent breach of its duty, imposed by state law, to maintain and keep in good condition its crossings over public streets.

26. The trial court erred in charging the jury as follows:

> Since the defendant in this case had a duty imposed by law, you the jury must determine whether Burlington Northern negligently breached that duty, *and,* if so, whether its negligence directly caused the injuries which the plaintiffs have suffered.

27. The grant of a new trial is essential to prevent irreparable injustice in this case.

28. The trial of this case did not do justice between the parties.

29. The evidence weighs so heavily against the verdict against defendant that a new trial should be ordered.

30. Considering all the grounds stated above cumulatively, the ends of justice would better be served by granting a new trial.

/s/ L. Vastine Stabler, Jr.

/s/ Frank D. McPhillips

Attorney for defendant Burlington Northern Railroad Company

1900 First National-Southern
Natural Building
Birmingham, Alabama 35203
(205) 252-8800

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. CV 82-C-2415-S

Alan Woods and Cara Woods,
Plaintiffs,

vs.

Burlington Northern Railroad Company,
Defendant.

NOTICE OF APPEAL

PLEASE TAKE NOTICE that Burlington Northern Railroad Company, defendant above named, hereby appeals to the United States Court Of Appeals For The Eleventh Circuit from the judgment and the final order denying defendant's Motion for Judgment Notwithstanding the Verdict, or in the Alternative, for a New Trial entered in this action on July 3, 1984.

/s/ L. Vastine Stabler
/s/ Michael C. Quillen
Attorneys for Burlington Northern
Railroad Company

OF COUNSEL:

CABANISS, JOHNSTON, GARDNER,
DUMAS & O'NEAL
1900 First National - Southern
Natural Building
Birmingham, Alabama 35203
(205) 252-8800

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. CV 82-C-2415-S

Alan Woods and Cara Woods,
Plaintiffs,

vs.

Burlington Northern Railroad Company,
Defendant.

MOTION FOR STAY OF EXECUTION PENDING APPEAL AND FOR APPROVAL OF A SUPERSEDEAS BOND

Comes now the defendant, Burlington Northern Railroad Company, a corporation, and moves this Court for an order staying execution of the judgment entered in this action on January 13, 1984, pending appeal and for an order granting leave to the defendant to file a supersedeas bond in the amount of Three Hundred Forty-Five Thousand Seven Hundred Fifty Dollars ($345,750.00) as security.

/s/ Michael C. Quillen
Attorney for Burlington
Northern Railroad Company

OF COUNSEL:

CABANISS, JOHNSTON, GARDNER,
DUMAS & O'NEAL
1900 First National - Southern
Natural Building
Birmingham, Alabama 35203
(205) 252-8800

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. CV 82-C-2415-S

Alan Woods and Cara Woods,
Plaintiffs,

vs.

Burlington Northern Railroad Company,
Defendant.

SUPERSEDEAS BOND

KNOW ALL MEN BY THESE PRESENTS, that we, Burlington Northern Railroad Company, a corporation, as Principal and St. Paul Fire and Marine Insurance Company, a Corporation, as Surety, are held and firmly bound unto Alan Woods and Cara Woods in the sum of $345,750.00 to be paid to the said Alan Woods and Cara Woods, their attorneys, successors, executors, administrators or assigns, to which payment to be well and truly made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 23rd day of July, 1984.

WHEREAS, on the 13th day of January, 1984 a Judgment in the amount of $300,000.00 in favor of Alan Woods and $5,000.00 in favor of Cara Woods, and on June 29, 1984, the Court overruled the motion of the defendant Burlington Northern Railroad Company for a new trial, and the said defendant has duly filed a notice of appeal from said judgment to the Court of Appeals for the Eleventh Circuit; and,

WHEREAS, the said Burlington Northern Railroad Company, Inc., desires a stay of all proceedings in the above entitled cause until the determination of the said appeal,

NOW, THEREFORE, the condition of this bond is such that if the said Burlington Northern Railroad Company, as Appellant, shall prosecute its appeal with effect and shall satisfy the said judgment in full together with costs, interest and damage for said delay if said appeal is dismissed or if the judgment is affirmed, and shall satisfy in full such modification of the Judgment and costs, interest and damages as may be adjudged and awarded by the Court of Appeals, then this obligation to be void, otherwise to remain in full force and effect.

BURLINGTON NORTHERN RAILROAD COMPANY, A CORPORATION, DEFENDANT AS PRINCIPAL

By: /s/ Michael C. Quillen
Its Attorney

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, A CORPORATION

By: _____
Its Attorney in Fact, as Surety

The foregoing Bond is hereby approved this _____ day of July, 1984, to stand as a Supersedeas until the final determination of the Appeal.

_____
Hon. U. W. Clemon
United States District Court

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-7510

D. C. Docket No. 82-2415

Alan Woods and Cara Woods,
Plaintiffs-Appellees,

versus

Burlington Northern Railroad Company, et al.,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Alabama

Before VANCE and JOHNSON, Circuit Judges, and MORGAN, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED;

It is further ordered that defendants-appellants pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: August 16, 1985
For the Court: Spencer D. Mercer, Clerk

By: /s/ Warren A. Godfrey
Deputy Clerk

ISSUED AS MANDATE: OCTOBER 1, 1985

APPENDIX K

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 84-7510

Alan Woods and Cara Woods,
Plaintiffs-Appellees,

vs.

Burlington Northern Railroad Company, et al.,
Defendants-Appellants.

MOTION FOR STAY OF PROCEEDINGS OR IN THE ALTERNATIVE FOR ORAL ARGUMENT

Comes now Burlington Northern Railroad Company, Defendant-Appellant in the above-styled case, and moves the Court for a stay of the proceedings to resolve Plaintiff-Appellees' Motion for Assessment of Statutory Penalty or, in the alternative, for an order allowing oral argument to be held to resolve said motion. As grounds for this motion, Defendant-Appellant says as follows:

1. The United States Supreme Court has granted review in *Aetna Life Insurance Company v. Lavoie,* 470 So. 2d 1060 (Ala. 1984) for the purpose, *inter alia,* of determining the constitutionality of the Alabama statutory affirmance penalty made the basis of Plaintiffs-Appellees' motion. *Aetna Life Insurance Company v. Lavoie,* 53 U.S.L.W. 3847 (No. 84-1601, June 4, 1985).

2. The issues raised in a constitutional attack of the statutory affirmance fee are extremely complex and oral argument of these issues will benefit the Court.

WHEREFORE, Defendant-Appellant respectfully prays for an order staying the resolution of the Motion for Assessment of

Statutory Penalty of the Plaintiffs-Appellees until the issue is resolved by the United States Supreme Court. To the extent that the United States Supreme Court fails to dispose of the issue, Defendant-Appellant requests oral argument of this issue.

WE RESPECTFULLY REQUEST ORAL ARGUMENT

/s/ Kenneth D. Davis
Attorney for Defendant-Appellant Burlington Northern Railroad Company

OF COUNSEL:

CABANISS, JOHNSTON, GARDNER,
DUMAS & O'NEAL
1900 First National - Southern
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Birmingham, Alabama 35203
(205) 252-8800

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Response to Appellee's Motion for Assessment of Statutory Penalty has been duly served upon the following by hand-delivery this 29th day of August, 1985:

Carlton T. Wynn
Francis H. Hare, Jr.
Alva C. Caine
Hare, Wynn, Newell & Newton
700 City Federal Building
Birmingham, Alabama 35203

/s/ Kenneth D. Davis
Of Counsel

APPENDIX L

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 84-7510

ALAN WOODS and CARA WOODS,
Plaintiffs-Appellees,

vs.

BURLINGTON NORTHERN RAILROAD
COMPANY, et al.,
Defendants-Appellants.

On Appeal From The United States District
Court For The Northern District Of Alabama

APPELLANT'S PETITION FOR PANEL REHEARING

NOT A PREFERENCE CASE

L. Vastine Stabler, Jr.
Michael C. Quillen
Kenneth D. Davis

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PETITION FOR REHEARING

This Court's affirmance of the judgment on a jury verdict failed to consider a crucial issue in the case by neglecting to rule on the propriety of a punitive damages argument made by plaintiffs' counsel. Additionally, the Court resolved other issues incorrectly due to a misconception of the facts. With such deficiencies, this Court must reconsider its decision and grant this petition for rehearing.

SUMMARY OF ARGUMENT

This Court's opinion affirms the judgment entered in favor of Alan and Cara Woods in spite of the existence of reversible error in the record. The trial transcript of this case reveals that counsel for the plaintiffs made an argument for the recovery of punitive damages even though the trial judge had ruled that there were no issues in the case for which punitive damages could be awarded. Moreover, District Judge Clemon overruled defense counsel's objection to this argument. Although federal law holds that it is an abuse of discretion for a trial court to permit this type of argument, this Court affirmed the district court judgment.

The Court also misunderstood the events which led to the admission of certain photographs into evidence. First, it was stated that counsel for Burlington Northern Railroad Company (hereinafter "Burlington Northern") disregarded the pretrial order when in fact it was counsel for the plaintiffs who sought

first to introduce evidence in contravention of the order. Second, the Court understood that the evidence admitted addressed an issue which the defendant expected to litigate which was the general condition of the track near Comandencia. *Woods v. Burlington Northern Railroad Company,* No. 84-7510, slip. op. at 5861 (11th Cir. August 16, 1985). In fact, Burlington Northern was forced to litigate the condition of the general area after the photographs were admitted into evidence. However, the true issue in the case was the condition of the track only at Comandencia where the incident occurred. Because of these misconceptions, this Court affirmed the rulings of Judge Clemon.

I. THE OPINION DID NOT DEAL WITH APPELLANT'S PRINCIPAL CLAIM AS TO IMPROPER ARGUMENT

The most egregious aspect of plaintiffs' counsel's closing argument was the "teach them a lesson" argument made despite Judge Clemon's ruling that punitive damages were not recoverable. The panel failed to address this critical issue in its opinion even though such an argument is wholly improper and constitutes reversible error. A federal trial judge commits reversible error when he permits a punitive damages argument when such damages are not recoverable. *Vanskike v. ACF Industries, Inc.,* 665 F.2d 188 (8th Cir. 1981); *Sturm v. Clark Equipment Company,* 547 F.Supp. 144 (W.D. Mo. 1982); *Smith v. Courter,* 531 S.W.2d 743 (Mo. 1976) (banc); *Louisville & Nashville Railroad Company v. Wade,* 280 Ala. 453, 195 So.2d 101 (1967).

The panel's opinion does not provide any guidance as to the rule which it intends to follow or establish regarding this issue. We do not know whether the Court disagrees with the *Vanskike* opinion and those from other jurisdictions or whether the Court believes that plaintiffs' attorney made no plea for punitive damages. If the Court chooses to part from the *Vanskike* ruling

and thereby cloud the distinction between punitive and compensatory damages, then so be it. On the other hand, there is simply no way to distinguish the impermissible argument in the present case from that in *Vanskike*. At any rate, by reaching a decision without discussing this crucial issue, the Court affirms a lower court ruling in the face of reversible error.

The holding of this Court is directly contrary to *Vanskike*. There, the plaintiff's attorney also employed a "teach them a lesson argument", by reminding the jury that it should serve as the conscience for the American public. That court, although recognizing that the trial judge was in a better position to regulate arguments of counsel, affirmatively held that the decision to permit the punitive damages argument was an abuse of discretion. The trial court was reversed. The Court's reasoning is expressed in the following quotation from *Smith v. Courter*, 531 S.W.2d 743, 748 (Mo. 1976) (banc), which is particularly applicable to the present case:

> Nevertheless, juries cannot be told directly or in effect that they may consider punishment or deterrence as an element of damages and include a sum of money in their verdict so as to punish the defendant or deter others from like conduct unless the pleadings, evidence and instructions warrant the separate submission of punitive damages under the law. To do otherwise, would eliminate the distinction between compensatory and punitive damages, a distinction long part of the law of this state, and would cloud every verdict to a point where the court could not know whether the compensatory damage verdict did or did not include a punitive sum.
>
> Of course, a court cannot now know the mind of each juror as he goes about the task of deciding upon the amount of the verdict, and jurors cannot be heard to impeach their own verdicts. So it comes of importance that jurors not be told they can include as part of their award

> an element of damages that the law does not allow. Therefore, they should not be motivated by argument to hold as one of their objectives, in arriving at the amount of their verdict, the punishment of the defendant or the deterrence of others.

Additionally, *Vanskike* noted that rules governing argument of counsel are procedural and are determined by federal law. Thus, the holding was not based on a determination of state law but rather is grounded in traditional federal rules. These rules should be applied to the present case.

The panel merely concluded in its opinion that the portions of the argument brought to its attention were permissible. The Court did not distinguish the argument made in this case from the argument held to be in error in *Vanskike*. Moreover, additional statements by plaintiffs' counsel were equally improper. The argument must be taken as a whole. When the many improprieties are coupled with the punitive damages argument, which is clearly reversible error, the argument as a complete unit must be regarded as a plea to the sympathies of the jury and must not be permitted by this Court.

Significantly, Judge Clemon gave his express voice of approval to the punitive damages argument of the plaintiff. The plaintiff's attorney made the following argument:

> City was telling them fix it, we've got a complaint, why don't you get out there and do it. Well, what's it going to take, what's it going to take? I submit to you it takes people like you sitting in juries to make them get out there and fix it.
>
> Mr. Stabler: Your Honor, I object to that argument.
>
> THE COURT: Objection is overruled.

R. Vol. VIII, p. 580.

The error was thus compounded by the approval of the Court.

A fair system of justice demands that one party not be subjected to punitive damages unless the law accords the other party the right to such an award. Arguments of counsel which blur the distinction between compensatory and punitive damages to the extent that it is meaningless should not be permitted. Trial judges which allow such argument should be reversed.

This Court in its original opinion failed to address perhaps the most important issue raised by this appeal. We respectfully request that careful review be made of the argument of plaintiffs' counsel.

II. THE ORIGINAL OPINION ERRONEOUSLY DETERMINED THAT THE DISTRICT COURT PROPERLY MODIFIED THE PRETRIAL ORDER

The original opinion of the panel concluded that Judge Clemon did not abuse his discretion by the manner in which the pretrial order was enforced. As a basis for the decision, the Court apparently determined that counsel for Burlington did not comply with the pretrial order. (See, Slip Opinion, p. 5861.) The opinion states:

> Counsel cannot show cavalier disregard for a district court's pretrial requirements and reasonably expect this court to extricate them from an unhappy aftermath.

Woods v. Burlington Northern Railroad Company, supra. at 5861.

It is hard for counsel for the defendant to accept the accusation that we cavalierly disregarded the pretrial order when there is no showing that we failed to comply with anything. Under the terms of the order the plaintiffs could not introduce exhibits without producing a list of exhibits by October 14, 1983. It is undenied that such a list was not furnished.

Judge Clemon's order did not impose a requirement for objections to be filed unless the list was received from the offering

party by October 14, 1983. There was nothing before the trial court or the parties to which the defendant could object. Since the evidence offered by the plaintiff was already inadmissible *under the express terms of the pretrial order,* how and why should the defendant be required to file further objections?

The Court must assess these events in light of its own lessons provided in the original opinion:

> Compliance with prescribed pretrial procedures is of increasing importance to the effective administration of justice in the face of burgeoning caseloads. *Trial judges and opposing litigants have a right to expect that the court's orders will be carefully followed in order that the business of the court may be handled expeditiously and fairly.* (Emphasis added).

Woods v. Burlington Northern Railroad Company, supra, at 5861.

After October 14, 1983, Burlington Northern's expectation in light of the pretrial order was that any exhibit offered by the plaintiff would be excluded.

Subsequently, Judge Clemon modified the pretrial order by allowing the plaintiff to offer exhibits even though not listed according to the terms of the order. Moreover, Judge Clemon summarily admitted the evidence because the defendant had not filed objections. Yet, the conditions precedent to the filing of objections had not been met. Under the express terms of the order, the evidence offered by plaintiff was already inadmissible.

At this time, we do not take issue with Judge Clemon's modification of the pretrial order permitting exhibits to be offered even though identified in an untimely manner and in a manner other than that prescribed by the order. However, the simultaneous expansion of the scope of the requirement to file written objections to include exhibits which were untimely and improperly produced is patently unfair.

Thus, it is not Burlington Northern which failed to comply with the terms of the original pretrial order. Burlington Northern's only sin was compliance with the terms of the original pretrial order. The failure of the railroad company to predict the manner in which the order would be modified was the basis for Judge Clemon's decision to admit the plaintiff's exhibits and is now the basis for the Eleventh Circuit opinion. The panel's failure to analyze the entire context within which the exchange of exhibits and objections were to be made resulted in a holding diametrically opposed to the basis upon which the holding was made. The party relying on the pretrial order has been punished while the party ignoring the pretrial order is rewarded.

III. THE APPELLATE COURT ERRED IN DETERMINING THAT CERTAIN PHOTOGRAPHS WERE RELEVANT TO THE ISSUE IN CONTROVERSY

With respect to the photographs at issue in this case, the Court has again failed to perceive the actual course of events at trial. In ruling that these photographs were relevant, the Court ascertained that "(B)urlington disputed this generalized state of deterioration." Implicit in this statement is that Burlington came to trial prepared to defend the condition of the track throughout a four-block area. In fact, the erroneous rulings of the trial judge dictated that the railroad defend this broad area.

The photographs at issue were admitted at an early stage of trial during the direct testimony of Officer Rick Whisenant. R. Vol. VI, pp. 78-84. Significantly, Judge Clemon failed to base his decision on principles of relevancy but instead admitted the photographs under his interpretation of the pretrial order. From this point on, Burlington was forced to adopt a defense which included the entire area. Had the trial judge ruled correctly, this "generalized state" would have never been at issue. Surely an adjustment in defense strategy which attempts to mitigate the

effect of erroneous rulings by the trial court is not grounds for finding that a defendant was not prejudiced by the rulings.

The record in this case clearly reveals that the admission of the photographs identified as Trial Exhibits 2-10 adversely affected the substantial rights of the railroad. When an accident occurs, the railroad should only have to defend the condition of the track where the incident happened. *Cf. Lawrence v. Florida East Coast Railway Company,* 346 So.2d 1012 (Fla. 1977). The condition of the track some thirty to one hundred yards away is of no import, especially since the angle at which traffic approaches the track is entirely different from one point to another. That is, any defects shown in the pictures offered by the plaintiff were far less likely to cause accidents than the jury was led to believe because traffic does not ordinarily pass over track at the area depicted in the erroneously admitted photographs. Moreover, the plaintiffs' own evidence was inconsistent as to whether the pictures contained scenes similar to the track at Comandencia. See e.g., R. Vol. VI, p. 143. Absent clear proof of similarity, the pictures were not relevant and should not have been admitted. *Lawrence v. Florida East Coast Railway Company, supra.*

IV. CONCLUSION

It is respectfully submitted that for the foregoing reasons this Court erred in its affirmance of the district court judgment. This petition should be granted and the judgment on the plaintiffs' verdict should be reversed.

Respectfully submitted,

/s/ Michael C. Quillen

Attorneys for Appellant
Burlington Northern Railroad
Company

OF COUNSEL:

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Birmingham, Alabama 35203
(205) 252-8800

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Appellant's Petition for Panel Rehearing has been duly served upon counsel for plaintiffs by hand-delivering same to Mr. Carlton Wynn, Mr. Alva C. Caine, and Mr. Francis H. Hare, Jr., HARE, WYNN, NEWELL & NEWTON, 700 City Federal Building, Birmingham, Alabama 35203, this the 4th day of September, 1985.

OF COUNSEL

APPENDIX M

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-7510

Alan Woods and Cara Woods,
Plaintiffs-Appellees,

vs.

Burlington Northern Railroad Company, et al.,
Defendants-Appellants.

On Appeal from the United States District Court for the
Northern District of Alabama

ORDER

Appellants' motion to stay further proceedings is DENIED.

Appellants' alternative motion for oral argument on appellees' motion for assessment of statutory penalty is DENIED. The question is controlled by binding precedent.

/s/ Robert S. Vance
United States Circuit Judge

APPENDIX N

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-7510

Alan Woods and Cara Woods,
Plaintiffs-Appellees,

vs.

Burlington Northern Railroad Company, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Alabama

ON PETITION FOR REHEARING

(September 23, 1985)

Before VANCE and JOHNSON, Circuit Judges, and MORGAN, Senior Circuit Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.

ENTERED FOR THE COURT:

Robert S. Vance
United States Circuit Judge

APPENDIX O

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number 82-C-2415-S

Alan Woods and Cara Woods,
Plaintiffs,

vs.

Burlington Northern Railroad Company,
Defendant.

STIPULATION

The parties by and through their attorneys of record stipulate to the following facts:

1. That the judgment of $300,000 in favor of Alan Woods and $5,000 in favor of Cara Woods, along with the interest and costs accrued thereon, has been paid in full by Burlington Northern Railroad Company, with the exception of the statutory affirmance penalty.

2. That payment of the $30,500 statutory affirmance penalty ordered by the Eleventh Circuit Court of Appeals pursuant to Alabama Code § 12-22-72 is being withheld pending resolution of further proceedings to be filed in the United States Supreme Court by the defendant regarding whether such an affirmance penalty is valid.

/s/ Carlton T. Wynn
Attorney for Alan Woods and
Cara Woods

/s/ L. Vastine Stabler, Jr.
Attorney for Burlington Northern
Railroad Company

APPENDIX P

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 84-7510

Alan Woods and Cara Woods,
Plaintiffs-Appellees,

vs.

Burlington Northern Railroad Company, et al.,
Defendants-Appellants.

STIPULATION

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/s/ Carlton T. Wynn
Attorney for Alan Woods and
Cara Woods

L. Vastine Stabler, Jr.
Attorney for Burlington Northern
Railroad Company